LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 4 1971
E. ROBERT SEAVER, CLERK

No. 71-49

Supreme Court of the United States

October Term, 1971

LOCAL UNION No. 18, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR PETITIONER

J. ALBERT WOLL
736 Bowen Building
815 15th Street, N. W.
Washington, D. C. 20005

WILLIAM PATRICK CLYNE
1510 Terminal Tower
Cleveland, Ohio 44113
Attorneys for Petitioner

Supreme Court of the United States

October Term, 1971

No. 71-49

LOCAL UNION NO. 18, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

v.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR PETITIONER

The Brief In Opposition serves to underscore, rather than undermine, the merit of the Petition. The Secretary of Labor tacitly concedes its major points by declining to respond to them. And his counter-arguments are flawed by plain errors of fact and logic.

1. (a) The basic issue raised in the Petition (at pp. 2, 7-14) is whether an eligibility requirement setting a standard that could be reasonably met by all the union's members becomes invalid *per se* in the event that a sub-

stantial percentage of the members choose not to meet that standard, thereby leading to their disqualification. In the Opposition (at pp. 6-7) the Secretary places his main reliance, as he has throughout this litigation, on the contention that *Wirtz* v. *Hotel Employees,* 391 U.S. 492, establishes such a percentage test.

The "less than fair" rule the Secretary now espouses is contrary to his position as of 1966, and to his request in *Hodgson* v. *Local 6799 Steelworkers,* 403 U.S. 333, that this Court grant certiorari to settle the very question "of national importance in the administration of the Act" presented here. Pet. pp. 7-8. Moreover that rule is destructive of established democratic trade union practices; and it can only be derived from *Hotel Employees* if that decision is read as stating an absolute standard to be applied across the board even though that frustrates the Act's policies, rather than as declaring "a purposefully administered legal principle" which, like any such principle, "is not . . . without exception" *(Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 297). Pet. pp. 8-14.

The Secretary does not touch upon, because he cannot do business with, any of the foregoing points. And that alone is, we submit, ample reason for granting the Petition.

(b) Aside from his reliance on the language of *Hotel Employees* the burden of the Secretary's response is that:

> "Petitioner's argument that the transfer requirement can easily be met by anyone who cares to qualify for union office is without merit, because a member's ability or willingness to incur a substantial expenditure bears no relation to his ability to hold office. As the district court stated, 'the Union's rule admittedly is not

directly related to a candidate's ability to serve as an officer * * *' (Pet. App. 16a)." Br. In Opp. p. 7.

That rule "relates [instead] to [the candidate's] motivation" (Pet. App. p. 16a); it is "a method of assuring a more highly motivated potential officer corps, who have demonstrated a greater degree of interest or stake in Local 18 by a relatively limited commitment" (Pet. App. p. 11a).

If there were anything in the legislative history, this Court's opinions, or the Secretary's administration of the Act, to demonstrate that qualifications are "reasonable" only if they are directly related to a candidate's ability to serve as an officer, our position—that the rule in question is valid because any member who wishes to qualify can do so easily—would indeed be "without merit." But none of these preconditions are satisfied. There is nothing in the legislative history or this Court's opinions to indicate that Congress wished to make enhanced ability to serve as an officer the sole legitimate basis for eligibility rules. And the Secretary has, from the first, permitted unions to continue to utilize "continuous good standing" rules, which like the instant rule simply measure a candidate's interest in the union's welfare. Pet. pp. 14, 17-18. Thus the argument developed at pp. 7-9 of the Opposition is a complete *non sequitur*, the sole function of which is to appear to answer the Petition without in fact doing so.

(c) The Secretary's statement of the case, and one portion of his argument (Br. In Opp. pp. 3-5, 8-9) are designed to create the impression that the Union's rule imposes a substantial burden which "falls most heavily upon [its] poorest members," and which is not imposed on "can-

didates who are already members of the Parent Local." The record refutes each of the foregoing suggestions.

First, the full initiation fee requirement is uniformly imposed. Every candidate must pay that fee as a condition of eligibility. To be sure, a candidate who is "already [a] member of the Parent Local" (Br. In Opp. pp. 8-9) does not have to make any payment at the time of his candidacy. But that is because he has previously made the required payment, not because he has been exempted from a requirement imposed on others. Thus every member is treated equally.

Second, while the "C Branch" members receive the lowest hourly wage, they work continuously all year. The work of the Union's remaining members is seasonal. A. 56. Thus the Secretary's characterization of those in the C Branch as "the union's poorest members" (Br. In Opp. p. 4) is unjustified by the record. Moreover, the import of the statement of Union President Possehl, quoted at p. 5 of the Opposition, is distorted by having been taken out of context. His testimony in its entirety makes it plain that it was his view that the "C Branch" members were restrained from transferring by the Union's skill requirement. A. 56-57. And that requirement is no longer an issue in the instant case because the Union did not challenge the District Court's conclusion that it was unreasonable in the Court of Appeals. Pet. App. n. 3 at p. 3a.

Third, any requirement which is more than *de minimis* will cause some members to forego their opportunity to become eligible. Thus, as we have stressed (Pet. pp. 9-10), the question in every case in which the rule accords the members an uncoerced choice is whether the union has set

the standard too high, thereby depriving potential challengers of a fair opportunity to qualify. The District Court was plainly correct in finding that the full initiation fee requirement was not unlawfully stringent. Judge Battisti noted "it is not the feeling of this tribunal that the amount of money involved is unreasonable in a colloquial sense." Pet. App. p. 15a. The proof of this lies in the fact that approximately two out of every five members of the Union, a total of 4,349 men, have chosen to pay the full initiation fee. The minimum that must be shown to prove that a standard has been set at too high a level is that at least one member who wished to qualify could not do so because of the rule. No such demonstration was made here. The record does not establish that the members who have not transferred to the "parent" local were precluded from doing so because the payment required would work a financial hardship. Seven "branch" members testified at the trial. Their testimony indicates that their choice was based on a lack of interest, rather than inability to pay. A. 32-34, 37-38, 40-48. Given the number who have qualified and the lack of any reason to suppose, or any evidence to suggest, that any member at all interested in an active role in the Union would find the full initiation fee requirement a barrier, this qualification cannot rationally be classified as a "device which operate[s] . . . [to further] control by incumbents." *Hotel Employees*, 391 U.S. at 505.

2. The Court of Appeals took it as self-evident that the imposition of a financial obligation on potential candidates beyond the minimum imposed on prospective voters is "patently undemocratic" and thus unlawful *per se*. Pet. App. p. 6a. The Opposition merely echoes this theme. Br.

In Opp. pp. 8-9. But this proposition has not been self-evident to the thirty-two states that require filing fees, to this Court (see *Dies* v. *Carter*, 403 U.S. 904), or to the Secretary in the administration of the Act, since he has sanctioned "continuous good standing" rules. Pet. pp. 14-18.

In this instance, as the others, the Secretary ventures no direct reply to our position; instead he argues that the initiation fee "bears no relationship to a [filing] fee" because it "ranges in price" for different members, and because it "is not earmarked to pay the costs of conducting an election but is used for general purposes." Br. In Opp. pp. 8-9. The first of these counters is unfounded as a matter of fact. Every member of the Union must pay the same total fee to become eligible—$100. Pet. App. pp. 3a-4a. And the second, even assuming its factual predicate, is unsound as a matter of logic.[1] From the candidate's point of view a fee to defray election costs is indistinguishable from one that is used for general purposes. And the Secretary suggests, and we can conceive of, no basis in democratic theory for preferring a fee used for one purpose rather than the other.

---

[1] It is not our understanding that as a general matter filing fees are "earmarked" in special trust funds rather than being paid into the states' general funds.

CONCLUSION

For the foregoing reasons the Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

J. ALBERT WOLL
736 Bowen Building
815 15th Street, N. W.
Washington, D. C. 20005

WILLIAM PATRICK CLYNE
1510 Terminal Tower
Cleveland, Ohio 44113
Attorneys for Petitioner

October, 1971.